"threat" to the independence of the magistrate comes from within, rather than without, the judicial department. 447 U. S. at 685.[26]

The contrast with the new bankruptcy courts could not be more extreme. Under the Act, no control remains in the district court over the activities of a bankruptcy judge such as exists over those of a magistrate (or a master). The bankruptcy court's powers and attributes, described earlier, are in every material respect the opposite of a magistrate's (or a master). Thus, for example, (1) the jurisdiction of the bankruptcy court is original and exclusive, not upon reference by the district court or subject to its withdrawal power; (2) the district judge may not freely reject the decisions of the bankruptcy court, but must review matters, if not displaced entirely by a panel of bankruptcy judges, only within the strictures of an appeal; (3) no additional evidence may be heard; and (4) the district court has no control over appointment or removal.

Raddatz rejects any such delegation of judicial power as the Act provides to the bankruptcy courts unless Article III protections are provided. Indeed, if the new bankruptcy courts were validated, it would be but a short step to the creation of a separate and independent magistrate system apart from Article III and in stark derogation of *Raddatz*.[27]

---

[26] The same lack of threat from without was true under the old bankruptcy referee system since referees were appointed and removed by the district court. 11 U.S.C. § 62(b). The new Act changes all that and makes them subject to executive and legislative control. Moreover, under the 1898 Act, referees were essentially like magistrates. See General Order Nos. 1, 12(2), 47 (1939). Under the 1973 Rules, district court control over referees remained, but shifted from the order of reference and power to rehear evidence to the power to "withdraw a case in whole or part from a referee" at any time. Bankruptcy Rule 102(b).

[27] In *Crowell v. Benson, supra,* this Court was also careful to indicate that in order to survive constitutional muster, delegation of fact finding authority by Article III courts must be only with appropriate district court supervision. Thus the Court noted that every jury trial in Federal Courts is "under the constant superintendence of the trial judge." In addition,

(Footnote continued on following page.)

CONCLUSION

The vital importance of guarding the integrity of the judiciary article of our Constitution should need no elaboration now. The authors of the Constitution recognized the perils implicit in the vast powers of the federal government. As this Court emphasized only last term, in *United States* v. *Will*, 449 U. S. 200, 101 S. Ct. 471 (1980), conformity with Article III is basic to our system of government and to our freedom.

We know of no way in which the issue in the present case can be decided without creating a major breach in our constitutional system; the government's brief demonstrates the startling sweep of the principles which must be utilized to reach its conclusion. They argue that Congress may ignore Article III, in the exercise of any of its specific legislative powers, such as under Article I; that it may place jurisdiction to decide, and power to enforce the decisions, in non-constitutional "courts" and "judges", dependent for periodic appointment and assurance of compensation upon the political process and powers.

In essence, we are confronted here by a bold plan to create a separate system of federal courts, with its own judges and staff, supplanting the district courts across a broad range of their jurisdiction, divorced of judicial control of its operations, and in violation of the judicial article of our Constitution.

(Footnote continued from preceding page.)

> "Where testimony in an equity cause is not taken before the court, the proceeding is still constantly subject to the court's control. And while the practice of obtaining the assistance of masters in chancery and commissioners in admiralty may be regarded, as we have pointed out, as furnishing a certain analogy in relation to the normal authority of the deputy commissioner in making what is virtually an assessment of damages, the proceedings of such masters and commissioners are always subject to the direction of the court and their reports are essentially advisory, a distinction of controlling importance when questions of a fundamental character are in issue." 285 U.S. at 61.

We respectfully submit that the judgment below should be affirmed, with the consequence that this matter will be reconsidered by the Congress so that a legislative plan may be devised which is in accordance with our basic institutions.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant

v.

MARATHON PIPE LINE CO.,

and

UNITED STATES,
Appellees

UNITED STATES,
Appellant

v.

MARATHON PIPE LINE CO., et al.,
Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF OF COMMERCIAL LAW LEAGUE OF AMERICA, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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BRIEF OF COMMERCIAL LAW LEAGUE OF AMERICA, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

Pursuant to Rule 36 of the Rules of this Court, the Commercial Law League of America respectfully submits this brief, as Amicus Curiae, in support of the appellants in the above-entitled appeals. All parties to these appeals have executed written consents which have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The Commercial Law League of America ("the League") is a national organization of more than 6,000 members having an active professional interest in the area of debtor and creditor relationships, insolvency and bankruptcy proceedings. Approximately 90% are practicing attorneys devoting the major portion of their time to commercial, bankruptcy and related matters. The remainder are law professors, bankruptcy judges and representatives of recognized commercial agencies and commercial law lists.

The League has long been an advocate of a functionally independent bankruptcy court with full jurisdiction over all matters arising out of or related to a bankruptcy proceeding. The League testified in support of such a court structure before the Bankruptcy Commission and also before both Houses of Congress.

The League is vitally interested in this case because of the threat posed by the decision below to the independent court system which was created by Congress, in response to the suggestions of the League and numerous other organizations, as an inherent and essential feature of its comprehensive overhauling of the bankruptcy law. That decision, if affirmed, could throw our entire system of bankruptcy administration into absolute chaos and cause severe disruption of the basic legal framework within which credit is granted and received in the United States.

SUMMARY OF ARGUMENT

The Bankruptcy Reform Act of 1978 was the result of an intensive study by Congress of the nation's substantive and procedural law on the subject of bankruptcy and reorganization. That study convinced Congress of the need for an independent bankruptcy court with full jurisdiction over all phases of the bankruptcy process. That study also convinced Congress that the desired objective could be constitutionally

achieved by creation of a system of non-tenured bankruptcy courts, each sitting as an adjunct to the United States District Court for its particular judicial district.

Contrary to the unsupported conclusion expressed by the court below, the expanded jurisdiction conferred on the bankruptcy court was not a "delegation of authority . . . to try cases which are otherwise relegated under the Constitution to Article III judges" (12 B. R. 946, at 947). The limitations on the jurisdiction of the bankruptcy courts created by the former Act of 1898 were not based on subject matter, but rather on such extraneous criteria as possession and/or consent. Every type of issue or controversy over which the bankruptcy courts have jurisdiction under the statute held unconstitutional by the court below, could have been and was, if either possession or consent were present, subject under the former law, to the so-called summary jurisdiction of the non-tenured bankruptcy court. On the other hand, most of the cases in which so-called plenary suits were necessary under the former law were required to be tried in non-tenured state courts, and the remainder could be brought in either state or federal courts at the option of the plaintiff (Bankruptcy Act § 23, 11 U. S. C. § 46).

The court below failed to follow any of the clearly marked guidelines delineating judicial review. It gave virtually no consideration to the deliberations and findings of the Congress, either as to the need for the new court structure or as to its constitutionality. It made no attempt either to construe the statute in a manner consistent with constitutional proscriptions, as it interpreted them, or to limit its determination to those portions of the statute which it found offensive. It similarly made no attempt to determine the case before it on non-constitutional grounds.

Finally, we would urge the Court, if it should find the existing court structure to be constitutionally objectionable, to limit its order so that it will only apply prospectively.

ARGUMENT

I.

THE DISTRICT COURT FAILED TO GIVE DUE CONSIDERATION TO THE FINDINGS AND DETERMINATIONS OF THE CONGRESS

A.

Intensive Congressional Investigation Demonstrated the Need for a Functionally Independent Court With Full Jurisdiction Over All Matters Related to a Bankruptcy Case.

The Bankruptcy Reform Act of 1978 (P. L. 95-598, approved November 6, 1978) represented the culmination of more than eight years of intensive study, hearings and debate concerning every aspect of the bankruptcy and reorganization process. That study was originally mandated by Congress when it created a special high-level Commission for the express purpose of recommending improvements in the existing system of bankruptcies and insolvencies.

The Commission, over a period of some three years, conducted an intensive and exhaustive survey of the existing bankruptcy law and the existing court structure. It sought, and received, input from countless individuals and organizations (including the League) having expertise, and interest, in the administration of bankruptcy and insolvency proceedings.

Notwithstanding the wide disparity of opinions and recommendations received by the Commission on most aspects of substantive and procedural bankruptcy law, there was a surprising unanimity of opinion on the need for an independent bankruptcy court with full jurisdiction over all issues arising in, or related to a bankruptcy case. As the Commission noted at

page 90 in its report filed July 30, 1973 ("The Commission Report")[1]:

> "A comprehensive grant of jurisdiction to the bankruptcy courts over all controversies arising out of any bankruptcy or rehabilitation case would greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money, and energy of the bankruptcy system and of those involved in the administration of debtors' affairs. It would foster the development of a more uniform, cohesive body of substantive and procedural law which would be applicable to the administration of estates under the Bankruptcy Act."

The deliberations and report of the Bankruptcy Commission were followed by an equally intensive study and examination of the bankruptcy system conducted by the respective Judiciary Committees of both Houses of Congress. During the five year period from 1973 when the Commission's suggested bill was first introduced, through 1978 when the Bankruptcy Reform Act was ultimately adopted, the Congress solicited and received proposals, testimony and memoranda from every group in the nation interested in any phase of the bankruptcy process and considered at least four separate and distinct pieces of comprehensive legislation.[2]

---

[1] The Commission Report, in its entirety, along with the complete Report of the House Judiciary Committee on the proposed legislation is reproduced in full, with original pagination, in Collier on Bankruptcy (15th Ed.) Appendix Volume 2. The Senate Judiciary Committee Report is similarly reproduced in Appendix Volume 3.

[2] Bill originally proposed by the Commission (S.2565 and H. R. 10792, 93rd Congress; Bill introduced by National Conference of Bankruptcy Judges (S.4046 and H. R. 16643, 93rd Congress); Bill ultimately reported out by Subcommittee on Civil and Constitutional rights of the House Judiciary Committee (H. R. 6, 8200, 95th Congress); Substitute Bill reported out by Subcommittee on Improvements in Judicial machinery of the Senate Judiciary Committee (S. 2266, 95th Congress).

Like the Commission before them, both Houses of Congress discovered the same virtual unanimity of opinion favoring the creation of an independent bankrutpcy court with full and complete jurisdiction. The Judiciary Committee of the House of Representatives in its Report No. 95-595 accompanying H. R. 8200 (House Committee Report) noted:

> "The concept of a Bankruptcy Court that is separate and independent from the District Court has been nearly universally supported. The Commission on the Bankruptcy Laws proposed it. The National Bankruptcy Conference testified in support of the proposition. The Commercial Law League of America and the American Bankers Association urged the Subcommittee to create an independent court system. Finally, the American Bar Association, at its 1976 meeting and the Association of the Bar of the City of New York have called for the creation of an independent bankruptcy court (House Committee Report 18).
>
> * * *
>
> Under the current bankruptcy law, the jurisdiction of the bankrutpcy court is limited by the concept of possession, either actual or constructive, or consent, either express or implied. An enormous case law has developed around this provision. Volumes have been written on what constitutes adequate possession to give the bankruptcy court jurisdiction and on what constitutes adequate consent. The Bankruptcy Court Rules promulgated by the Supreme Court take the position that a failure to object to jurisdiction, constitutes consent. One bankruptcy judge has termed this 'jurisdiction by ambush'. The issue of the jurisdiction of the Bankruptcy Court has been litigated in every volume of the Federal Reporter. Intervening amendments of the Bankruptcy Act have not significantly affected the volume of this litigation. In an area of law in which time is of the essence, the delay attendant upon litigation over jurisdiction is needless and expensive. (House Committee Report 43).
>
> * * *
>
> There are several objectionable results to the division of jurisdiction of the judicial business generated by bankruptcy cases. The first is delay. Not only are the

> proceedings in non-bankruptcy courts likely to be paced more slowly with longer intervals between successive steps, but the dockets of the non-bankruptcy courts are likely to be more crowded and commencement of the trials more likely to be postponed in such courts than in bankruptcy courts. Delay is critical in cases under the Bankruptcy Act, particularly in the business cases where litigation is most likely to occur. This is true because of the prejudicial effect it might have on prospects for rehabilitating an enterprise in financial distress and the aggravated risk of deterioration of the estate in the course of liquidation. (House Committee Report 44-45).

In thus concluding that the creation of an independent bankruptcy court with full jurisdiction was essential to a meaningful reform of the bankruptcy system, the House Judiciary Committee specifically noted the concern which this Court has consistently expressed for the prompt and expeditious administration and settlement of bankruptcy cases, citing Ex parte *Christy,* 3 Howard 292, 312 (1845); *Bailey* v. *Glover,* 88 U. S. (21 Wall) 342, 346 (1874); *Wiswall* v. *Campbell,* 93 U. S. 347, 350-351 (1876); *U.S. Fidelity Co.* v. *Bray,* 225 U. S. 205, 218 (1912); and *Katchen* v. *Landy,* 382 U. S. 323, 328-9 (1966) (House Committee Report 45, note 26).

The Senate reached a similar conclusion. Report of the Senate Judiciary Committee No. 95-989 accompanying S.2266 (Senate Committee Report) stated:

> "The need for a functionally independent bankruptcy court has been demonstrated beyond question, first by the study and recommendations of the Commission on the Bankruptcy Laws of the United States, by knowledgable witnesses before the Subcommittee, in published commentary, as well as through long practical experience under the present referee system . . . (Senate Committee Report, 15-16
>
> . . . .
>
> A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy

court, in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction, a wasteful remnant of the referee system left over from the pre-Chandler Act era. For fully four decades, and more notably during the present decade, referees in bankruptcy have served as trial judges of the bankruptcy court whose orders are final unless a timely appeal is taken to the district court. Yet the jurisdictional limitations presently imposed on the bankruptcy courts have embroiled the court and the parties in voluminous litigation whose sole function is to determine whether the court possesses the requisite summary jurisdiction to determine the merits of issues often necessarily heard by the court in determining its jurisdictional question. Upon a finding that it lacks summary jurisdiction, the bankruptcy court is required to dismiss the action, whereupon it is necessary for the parties to proceed anew with the plenary action in either the U. S. district court or appropriate state court to try issues already substantially tried in the summary proceeding before the bankruptcy court. Frequently, the liquidation of bankrupt estates in the rehabilitation of debtors are significantly prejudiced thereby.

The advent of the Rules of Bankruptcy Procedure, with their automatic reference of most bankruptcy matters to the referee in bankruptcy and their scrupulous insistence upon procedural due process, have underscored the absurdity of perpetuating these jurisdictional limitations in bankruptcy cases arising under Title 11 and civil actions and proceedings arising under or related to cases under Title 11." (Senate Committee Report 17-18).

The court structure ultimately created[3] was, in the opinion of Congress, and in the opinion of the League, an absolute essential to any meaningful reform of the bankruptcy law. It should not be lightly discarded.

---

[3] The new Bankruptcy Court, as such, will not come into existence until April 1, 1984. (Reform Act § 402(b)). During the transition period, however, the existing bankruptcy judges are retained in office and vested with substantially the same jurisdiction as that to be vested in the new court (Reform Act § 405(a)).

B.

The Constitutionality of the New Court Structure Was Carefully Considered by the Congress.

At the same time that both Houses of Congress considered the need for a functionally independent court with full jurisdiction, they were equally concerned with the need to comply with the Constitution. Opinions were sought and received not only from some of the leading scholars in the nation, but also from the Department of Justice and the Judicial Conference.

After due considerations of the opinions which it received[4] the House originally proposed and passed a bill (H. R. 8200) calling for a separate Article III bankruptcy court. That proposal would have been clearly constitutional, but was strenuously opposed on policy grounds by, among others, both the Judicial Conference and the Department of Justice.[5]

The Senate Judiciary Committee, through its Subcommittee on Improvements In Judicial Machinery, undertook to find a solution which would meet the objections raised to an Article III court but still comply with the Constitution. The Committee proposed, and invited comment on, a bankruptcy court of non-tenured judges, which, while functionally independent would remain as an adjunct of the United States District Court.

The reaction to the adjunct court proposal was quite positive. Attorney General Bell, speaking for the Department of Justice, noted:[6]

"Although the Department of Justice believes that a nontenured or Article I court raises constitutional ques-

---

[4] House Committee Report, pp. 63-87.

[5] House Committee Report, 18-20, 32 n. 203; Hearings before Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate, 95th Congress on S.2266 and H. R. 8200 Nov. 28, 29 and Dec. 1, 1977 (Senate Hearings) 544.

[6] Senate Hearings 544.

> tions, and, although we cannot support an independent tenured or Article III court for what I regard as sound policy reasons, *we can support a bankruptcy court with new and expanded powers and resources that will, however, continue to operate as an adjunct of the district court.* (Emphasis added)

Even more significant was the following testimony submitted by Circuit Judge Ruggero J. Aldisert of the Court of Appeals for the Third Circuit, on behalf of the Judicial Conference:[7]

> "I would open by saying that the committee endorses completely the concept of jurisdiction embodied in Senate bill 2266. We thank you, Mr. Chairman, for introducing a bill which, in its jurisdictional provisions, reflects the concerns felt by this committee representing the Judicial Conference of the United States. . . .
>
> *We believe that the bankruptcy judge could handle this increased jurisdiction without the necessity of being an Article III Judge.* (Emphasis added)
>
> . . . .
>
> I would like to emphasize, Mr. Chairman, that it is very unusual to get a group of Federal judges to agree on anything. I suppose we are the great rugged individualists. Being a member of an appellate court where there are frequently majority, concurring, and dissenting opinions, I know the life of majority and minority reports.
>
> But I think it is very significant that, when it came to the question, not as to a decision as to whether there should be an Article III judge or another type of judge, but strictly from the juris prudential standpoint, *from the standpoint of the constitutionality of the bankruptcy judge assuming increased powers, there was unanimity in this committee and there was unanimity in the Judicial Conference of the United States that Article III status was not necessary to assume that expanded jurisdiction.* Circuit conferences, consisting of every district and every circuit

[7] Senate Hearings 412-44.

judge within a circuit, have concluded that an Article III judge is not necessary. The only circuit conferences that have not so concluded are the first circuit and the District of Columbia Circuit, because the question was not presented to them. (Emphasis Added)

I think that is extremely significant."

Following the hearings, the Senate Committee concluded that by establishment of the new court as a non-tenured adjunct to the district court, Congress could meet the "need for a functionally independent bankruptcy court" and that "certain perceived constitutional impediments to the exercise of ... judicial power of the United States ... [would] thus [be] eliminated." Senate Report 15-16.

That adjunct court concept, with minor modifications, was ultimately enacted into law. It should have been upheld by the court below.

C.

The Court Structure Created by Congress Was Entitled to the Presumption of Constitutionality.

This Court has traditionally and consistently exercised great restraint whenever an act of Congress is under constitutional attack. The presumption of validity and constitutionality which attaches to an act of Congress has consistently and repeatedly been noted by this Court in opinions such as *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 15, (1976); *United States* v. *National Dairy Co.*, 372 U. S. 29, 32 (1963). Seldom, if ever, has this Court struck down a Federal statute without making every possible attempt to reconcile the Congressional findings and intent with Constitutional requirements.

It was error for the district court to reject the proposed statute without giving even the slightest consideration to the

Congressional deliberations and conclusions which led to its adoption. The appropriate approach to be taken in this case is that demonstrated in *Palmore* v. *United States,* 411 U. S. 389 (1973), where this Court upheld the non-tenured courts established for the District of Columbia, saying at pages 407-408:

> "It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Article III Court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accomodate plenary grants of *power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.*" (Emphasis added).
>
> "From its own studies, Congress had concluded that there was a crisis in the judicial system of the District of Columbia, that case loads had become unmanageable and that neither those matters of national concern nor those of strictly local cognizance were being promptly tried and disposed of by the existing court system. The remedy in part, was to relieve the regular Article III courts . . . from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do . . . The other part of the remedy, equally essential, was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction."

The analogies between *Palmore* and this case are striking. Congress had determined, based on an exhaustive study that the existing bankruptcy court structure was not adequately meeting the needs of the modern economy. Congress had also determined that revesting in the Article III district courts of jurisdiction to hear and determine bankruptcy cases would, in the light of the already overloaded condition of the Article III courts, be "unworkable." House Committee Report 14-15, 21.

Just as in the *Palmore* case, Congress, after careful consideration, determined that it preferred, and had the power to create, an adjunct bankruptcy court of non-tenured judges. The same considerations which led this court to uphold the Congressional determination in *Palmore* should persuade it to sustain the Congressional determination made in the Bankruptcy Reform Act of 1978.

The suggestion that the rule of *Palmore* is limited to cases involving only local law, is refuted by such landmark decisions as Ex parte *Bakelite Corp.*, 279 U. S. 438, 449 (1929) and *Crowell* v. *Benson,* 285 U. S. 22, 54 (1932). In *Bakelite,* this court held the Court of Customs Appeals to be a validly created legislative court, saying:

> "It long has been settled that Article III does not express the full authority of Congress to create courts and that other Articles invest Congress with power in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution."

Similarly, in *Crowell* v. *Benson,* this Court upheld the delegation to a non-tenured administrative agency of jurisdiction to hear disputes under the National Longshoremen and Harbor Workers Compensation Act, specifically noting that Congress had legislatively determined the need for:

> ". . . a method shown by experience to be essential in order to apply its [the Act's] standards to the thousands of cases involved, ..."

In both of these cases, this Court found that Congress had authority—under Article I—to create a tribunal with jurisdiction in areas of national concern. When read together with *Palmore*, they furnish ample support for the constitutionality of the adjunct court created by the Bankruptcy Reform Act of 1978.[8]

II.

THE BANKRUPTCY REFORM ACT DOES NOT DELEGATE TO BANKRUPTCY JUDGES AUTHORITY TO TRY CASES OTHERWISE RELEGATED UNDER THE CONSTITUTION TO ARTICLE III JUDGES

The thrust of the district court's opinion is that § 1471 of Title 28 U. S. Code, as amended by the Bankruptcy Reform Act is a "delegation of authority . . . to the bankruptcy judges to try cases which are otherwise relegated under the Constitution to Article III Judges . . . ." (12 B. R. 946, at 947) That holding reveals a basic misunderstanding of both the former Bankruptcy Act of 1898 and the changes effected by the 1978 Reform Act.

The Bankruptcy Act of 1898 ("Bankruptcy Act") constituted all of the United States district courts as "courts of bankruptcy within their respective territorial jurisdictions" (Bankruptcy Act (§ § 1(10), 2a, 11 U. S. C. § § 1(10) 11(a)).

The 1898 Act specifically authorized the judges of the various courts of bankruptcy to appoint officials known as "referees." Bankruptcy Act § 34; 11 U. S. C. § 62. Although the referee's function was, at first, largely ministerial, it ultimately evolved into what was, for all practical purposes, the bankruptcy court itself. The term of office was increased from two to

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[8] Just as *Bakelite* was held to support the constitutionality of the non-tenured Tax Court which was specifically created by Congress as an Article I court to hear matters of national concern (26 U. S. C. § 7441). *Nash Miami Motors* v. *Commissioner*, 358 F. 2d 636, 637-8 (5 Cir. 1966) cert. den. 385 U. S. 918; *Burns, Stix, Friedman & Co.* v. *Commissioner*, 57 T. C. 392, 394, 395-398 (1971).

six years (Bankruptcy Act § 34, 11 U. S. C. § 62). The old fee system was abolished and replaced by a stipulated salary subject to adjustment in accordance with the Federal Salary Act of 1967 and § 461 of Title 28 United States Code (Bankruptcy Act § 40(a)). Orders of referees were expressly made final except where the aggrieved party filed a timely petition to seek review by the District Judge within ten days after entry (Bankruptcy Act § 39(c); 11 U. S. C. § 67(c)).

A particularly important development in this connection was the issuance by this Court in 1973 of the Rules of Bankruptcy Procedure. A primary theme underlying those Rules was:

> "... a purpose to emphasize the judicial in contradistinction to the ministerial functions of the referee in bankruptcy administration and to enhance the dignity of the office as that of the *principal judge of the bankruptcy court*". (Emphasis added). Advisory Committee Note To Preliminary Draft, (Collier 1981, pamphlet edition, Bankruptcy Rules p. 5).

Among the many provisions of the Rules which thus enhanced the dignity and status of the non-tenured referee as principal judge of the bankruptcy court were:

(a) Rule 102 providing for automatic reference of all bankruptcy cases to a referee for virtually all purposes subject only to the rarely-exercised right of withdrawal for convenience of the parties or other cause;

(b) Rules 115 and 409(c)(2) providing for the authority of a referee to conduct a jury trial in certain prescribed situations;

(c) Rule 116 authorizing the transfer of cases by referees;

(d) Rules 801ff., inclusive, substituting a true appeal procedure with respect to referee's orders for the "petition for review" prescribed by § 39(c) of the Bankruptcy Act;

(e) Rule 810 codifying the numerous decisions requiring acceptance of a referee's findings of fact on appeal unless

clearly erroneous and eliminating the authority of the district court to receive further evidence on appeal;

(f) Rule 901(7) specifically authorizing the use of the term "bankruptcy judge" as an appropriate designation for the referee.

The non-tenured bankruptcy court which thus developed was a true court in every sense of the word. It heard testimony, received evidence and rendered judgments which were final and enforceable except where appeals were taken within the time, and in the manner which the Rules prescribed. Furthermore, its jurisdiction could and did extend to every type of question of federal and/or state law which could possibly arise in a bankruptcy setting.[9]

The scope and extent of the subject matter jurisdiction of the bankruptcy court under the former law is apparent from just a few examples. The bankruptcy court from its inception has had exclusive jurisdiction to hear and determine the validity, priority and extent of claims against the estate including any tax claims not previously contested before and adjudicated by a competent non-bankruptcy tribunal. Bankruptcy Act, § 2(a)(2A), 11 U. S. C. §§ 11(a)(2A). Provable debts under the Bankruptcy Act included every type of a claim arising out of any contract, express or implied; taxes due and owing to any federal, state or local government, awards of industrial commissions or similar bodies, rights to recover damages in an action for negligence instituted prior to bankruptcy, contingent debts and contingent contractual liabilities and claims for anticipatory breach of contracts or leases.

[9] There were, of course, extensive and troublesome limitations on the court's jurisdiction. These limitations, however, had nothing whatsoever to do with the nature of the substantive questions which the court was called upon to decide. On the contrary, they almost invariably rested upon the tangential questions of possession and/or consent. See Commission Report, pp. 88-89; House Committee Report 43-44; Collier on Bankruptcy, 14th Edition, Vol. 2, pp. 449ff, and cases therein cited.

Bankruptcy Act §§ 63, 64, 11 U. S. C. §§ 103, 104. There was virtually no substantive question of state or federal law which could not and did not come before a bankruptcy court in the consideration of disputed claims.

Similarly, a virtually unlimited scope of subject matter jurisdiction was exercised by the bankruptcy courts under Section 17(c)(3) of the Act (11 U. S. C. § 35(c)(3), which was adopted as part of the "Dischargeability Act of 1970." Pursuant to Section 17(c)(3), whenever the bankruptcy court determined that any debt or claim asserted against a bankrupt was not dischargeable, the court was then mandated to "determine the remaining issues, render judgment and make all orders necessary for the enforcement thereof." Again, every conceivable question of federal or state civil law could properly come before, and be decided by, the non-tenured bankruptcy court.

Finally, there was, of course, the ever present doctrine whereunder any case whatsoever could be heard and determined by the bankruptcy court, in the exercise of its so-called summary jurisdiction, if the adverse party was found to have consented thereto. Consent for this purpose was by no means required to be express or even affirmative. Filing a proof of claim was held to constitute consent to any related counterclaim, or to any action to recover a voidable transfer.[10] Similarly, consent was found wherever the adverse party had contracted with or dealt with officers of the court, such as a trustee or debtor-in-possession,[11] and/or had failed specifically to contest the court's jurisdiction within a specified time (Bankruptcy Act § 2a(7), 11 U. S. C. § 11(a)(7), Rule 915(b), Rules of Bankruptcy Procedure).

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[10] *Katchen* v. *Landy*, 328 U. S. 323, 333-336 (1966), In re *Majestic Radio and Television Corp.*, 227 F. 2d 152, 156 (7 Cir. 1955).

[11] In re *F. W. Koenecke & Sons, Inc.*, 369 F. Supp. 558, 561 (N. D. Ill. 1973) and authorities collected therein.

There was, therefore, no question of federal or state law which could not be, and which was not, in fact, litigated before, and decided by non-tenured referees in bankruptcy under the former Act. These referees decided controversies encompassing the entire range of civil law and involving amounts running into millions of dollars. Yet throughout the entire history of the Bankruptcy Act, not one serious challenge was ever raised to the constitutionality of the court system thus created or to the legitimacy and/or enforceability of the judgments and determinations rendered thereby.

Every argument advanced by the court below with respect to the constitutional infirmity of the present court system could have been applied with equal force to the court system under the former law. Unless this Court should now conclude that we have been operating under an unconstitutional structure for at least the last forty years, it must reverse the decision of the district court.

The court below (12 B.R. 948, n.4) complains of the "legislative sleight of hand" whereunder the jurisdiction granted to the district courts by 28 U.S.C. subsections 1471(a) and (b) is then reposed in the bankruptcy court by subsection 1471(c). Subsection 1471(c), however, is really nothing more than the logical extension of Section 22(a) of the Bankruptcy Act (11 U.S.C. § 45) as modified by Rule 102 of the Rules of Bankruptcy Procedure.

The only changes effected by Subsection 1471(c) from the former procedure were:

> First, under the new law the initial papers are filed directly with the clerk of the bankruptcy court, rather than being filed in the first instance with the clerk of the district court who then immediately transferred them to the clerk of the referees in bankruptcy.
>
> Second, the new law contains no provision equivalent to Rule 102(b) which authorized the district judge, for convenience of the parties or other cause, to withdraw a reference and hear the case himself.

Certainly the first of these changes, being purely mechanical, effected no change in the constitutional status of the court. As to the second, if retention of the district court's power to withdraw a reference should be held to be constitutionally necessary, then the proper remedy would be to construe subsection 1471(c) as still being subject to Rule 102(b) rather than to discard the entire court structure.[12]

It is, of course, true that the new law does confer on the bankruptcy courts jurisdiction to hear and determine many cases which formerly could have been brought only in other courts. However, it is by no means true that the cases encompassed by this expanded grant of jurisdiction were cases which are "otherwise relegated under the Constitution to Article III judges." The cases which the new court can hear, and which the old court could not, are suits related to a bankruptcy case, but which did not fall within one or more of the pigeon holes of summary jurisdiction. Except in those instances, however, where a separate ground of federal jurisdiction was present, or where federal jurisdiction was conferred by consent, these suits were required to be brought in state courts;[13] in no case that we can think of were they *required* either by the Constitution, or by statutes to be brought in *federal* courts.

It is difficult, if not impossible, to see how the Constitution has been circumvented by the transfer of jurisdiction of plenary actions from non-tenured state courts completely outside the federal judicial system to a bankruptcy court which is specific-

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[12] The existing Rules of Bankruptcy Procedure, have been specifically kept in effect, to the extent not inconsistent with the Bankruptcy Reform Act or the amendments effected thereby. Bankruptcy Reform Act, P. L. 95-498, § 405(d).

[13] Bankruptcy Act § 23(b); 11 U. S. C. §46(b). That restriction did not apply to cases related to Chapter X proceedings, however, which could be brought in either federal or state court regardless of any independent ground of federal jurisdiction. *Williams* v. *Austrian*, 331 U. S. 642, 661 (1947). The same was true of actions to recover preferences and fraudulent transfers. Bankruptcy Act §§ 60 (b), 67(e); 70(e) (11 U. S. C. §§ 96(b); 107(e); 110(e).

ally created as an adjunct of an Article III court (28 U. S. C. § 151(a)), and whose final judgments and orders are appealable as of right[14] by at least one Article III court.[15]

III.

THE DISTRICT COURT DISREGARDED THE WELL-ESTABLISHED GUIDELINES APPLICABLE TO JUDICIAL REVIEW

This Court has, on many occasions, announced a set of clearly marked guidelines and limitations which are traditionally and consistently observed in the area of judicial review. These guidelines which were spelled out in detail by Mr. Justice Brandeis, concurring, in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-348 (1935) include the following:

> "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' . . . 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'
>
> . . .
>
> The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'

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[14] Except that orders granting or denying a motion to abstain from all or part of a case or a motion to remand a case are not subject to review of any kind. 11 U. S. C. § 305(c); 28 U. S. C. §§ 1471(d), 1478(b).

[15] The judicial code, as amended, provides a three pronged method of appeal. If the circuit council of a circuit so orders appeals from final orders of the bankruptcy court may go to a panel of three bankruptcy judges whose judgments and orders are in turn subject to appeal as of right to the United States court of appeals for the circuit (28 U. S. C. §§ 1293, 1482). If no such panel is ordered, then the appeal shall go to the district court and thence as of right to the court of appeals (28 U. S. C. §§ 1291, 1334). Finally, if all the parties to an appeal so agree, it may go directly from the bankruptcy court to the court of appeals (28 U. S. C. §§ 1293(b).

. . .

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.
>
> . . .
>
> 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. . . .' "

The district court, however, made no attempt whatsoever either to reconcile the statute with the Constitution or to delineate and pinpoint the precise areas deemed incapable of such reconciliation. Both the original order and the supplemental opinion declare the entire Section 1471 of Title 28 to be unconstitutional. If sustained, that holding will, of necessity invalidate the entire court structure and throw into absolute chaos the status of all proceedings throughout the country which have been commenced in any bankruptcy court since the effective date of the Reform Act.

The rationale of the decision below, however, would seem to apply only to one subsection; namely 1471(c). Nothing in the opinion suggests that there was any impropriety whatsoever in subsections §§ 1471(a) and (b) which confer upon the district courts jurisdiction of all bankruptcy cases and all matters arising out of or related to a bankruptcy case. It is settled beyond dispute that the constitutional grant (Art. 1, Sec. 8, Clause 4) of authority to establish uniform laws on the subject of bankruptcies necessarily implies authority to grant such jurisdiction to federal courts. *Taubel-Scott-Kitzmiller Co.*

v. *Fox*, 264 U. S. 426, 430-431 (1924); *Schumacher* v. *Beeler*, 293 U. S. 367, 371-2 (1934), *Williams* v. *Austrian*, 331 U. S. 642, 652-3 n. 24, 664 (1947). Similarly, the district court did not question the validity of subsections 1471(d) and (e). The entire thrust of the opinion below is toward subsection (c) whereunder Congress directs that the jurisdiction conferred upon the district courts shall be exercised (subject to the right of appeal) by their non-tenured adjunct, viz., the bankruptcy court.

Under the established guidelines, it would have been appropriate for the district court first to determine whether there was any means by which § 1471(c) could have been construed so as to reconcile it with the constitutional standards and then, if unable to effect such reconciliation, to delineate its opinion in such a manner as to still give the greatest possible effect to the express intent of Congress.

As we have already noted, the only real difference effected by subsection 1471(c) was to eliminate the power of the district courts to withdraw a case from the bankruptcy court pursuant to Rule 102(b) of the Rules of Bankruptcy Procedure. If we assume, for the sake of argument, that elimination of this power of withdrawal was enough to run afoul of the Constitution, then the appropriate course was to construe subsection 1471(c) as not repealing Rule 102(b), so that the power to withdraw thus remained intact. On the other hand, if the district court was convinced that nothing short of full Article III status satisfied constitutional requirements, then, rather than throw out the entire court structure, it should have merely stricken those provisions of the new law which specifically conflicted with the tenure and pay requirements of Article III.[16] Either of such approaches would have done far less violence to the intent of Congress than the course actually followed below.

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[16] Cf. suggestion of Prof. Joe Desha Lucas noted at House Committee Report 74.

A particularly troublesome situation has been created because the district court disregarded this Court's mandate to avoid passing upon a constitutional question where any other ground of disposition may be available. One of the grounds on which defendant had moved to dismiss the case was that it was barred by a prior action pending in another district court.[17] Although that contention, if sustained, could have disposed of the entire case, the district court completely ignored it and proceeded to render a decision which placed a cloud of uncertainty over our entire system of bankruptcy courts.

Because of the uncertainty thus created, however, we would urge this Court to decide this important constitutional question at this time even though it might not be strictly necessary in the context of this particular case.

IV.

IF THIS COURT SHOULD FIND IT NECESSARY TO INVALIDATE THE NEW COURT STRUCTURE, THE DECISION SHOULD NOT BE GIVEN RETROACTIVE EFFECT.

We believe that we have demonstrated that the creation of the new court structure in response to a clearly demonstrated need therefor was a valid exercise of the power delegated to Congress by the Constitution. We also believe that we have demonstrated that should a possible area of invalidity be found by the court, the proper remedy would be to construe the statute in such a manner as to meet constitutional requirements and not to destroy or impair the basic grant of jurisdiction to the court itself. If, however, this Court should be convinced that the entire court structure must be discarded, or its jurisdiction substantially impaired, then we would urge the Court to

[17] That issue was discussed in depth by the bankruptcy judge. 6 B. R. 928, at 931.

specifically limit such holding to this particular case and to cases commenced from and after the date of the decision. To do otherwise would cause severe and irreparable hardship to the countless litigants who have already submitted substantial controversies to the new court and would create intolerable uncertainty and confusion with respect to the judgments, orders and decrees which have been entered since the effective date of the Bankruptcy Reform Act.

Ample precedent exists for such limitation in appropriate circumstances. A classic example is *Brown* v. *Board of Education,* 349 U. S. 294, 300-301 (1955) wherein this Court set forth the standards for enforcement of its earlier decision that segregated schools were unconstitutional (347 U. S. 483; 347 U. S. 497). In *Brown,* the Court, recognizing the need for a "practicable flexibility in shaping remedies" remanded the cases to the district courts with instructions to effectuate a transition to a racially nondiscriminatory school system "with all deliberate speed."

In similar fashion, this Court has ruled that many of its landmark decisions respecting the rights of accused criminal defendants should be applied only prospectively because retroactive application would have had a serious adverse effect on the administration of justice. *Stovall* v. *Denno,* 388 U. S. 293, 296-7 (1967); *Linkletter* v. *Walker,* 381 U. S. 618, 619-20, 629 (1965); *Johnson* v. *New Jersey,* 384 U. S. 719, 721, 726-27 (1966).

It is difficult to conceive of a situation where retroactive application of a constitutional decision would have a greater adverse effect on the administration of justice than would retroactive determination that all or a substantial portion of the proceedings and determinations of the bankruptcy courts under the Bankruptcy Reform Act might now be open to collateral attack. We urge this court to preclude any such possibility.

CONCLUSION

For the reasons above set forth, the Commercial Law League of America urges this Court to reverse the district court and to declare that Congress acted within its valid and legitimate legislative powers in the creation of the adjunct non-tenured bankruptcy court prescribed by the Bankruptcy Reform Act of 1978.

Respectfully submitted,

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